Plaintiff Delia Polanco ("Plaintiff" or "Ms. Polanco") submits this reply brief in support of her motion for summary judgment [DE 66] as to liability for Defendant NCO Portfolio Management, Inc. ("Defendant", "NCO" or "NCOP") for violations of the FDCPA and for conversion.

Defendant's opposition is based upon a premise that it is not a debt collector, only a purchaser of defaulted consumer debts, as if the two were mutually exclusive [DE 77]("Def. MSJ Opp"). *See also* [DE 77-4], NCO's Local Rule 56.1 counterstatement of facts ("Def. 56.1") in response to [DE 68], Plaintiff's original Local Rule 56.1 statement of facts ("Pl. 56.1"). Adopting the premise that it is only a debt buyer, NCO argues that it cannot be held liable for the debt collection violations against Plaintiff nor for the conversion of her property. NCO's opposition should fail. As such, for the reasons described in greater detail herein, NCO is a debt collector. Furthermore, NCO is liable for debt collection violations against Plaintiff and for conversion of Plaintiff's property.

1. Most of NCO's arguments have already been dealt with in Plaintiff's other pleadings.

As would be expected in cross-motions for summary judgment, issues raised by Defendant's opposition to Plaintiff's motion for summary judgment have already been addressed in Plaintiff's opposition to Defendant's motion for summary judgment.

NCO argues that Ms. Polanco may not continue her claims against NCO because she settled her (non-identical) claims with former defendant Mel S. Harris & Associates. DE 77, Def. MSJ Opp. pp. 6-8. Plaintiff incorporates by reference her prior rebuttal to this argument made in DE 80, Pl. Opp, pp. 16-18, ¶ C., arguing, *inter alia*, that *Nelson* involved of entry of judgment rather than settlement.

2. NCOP, a debt buyer whose principal purpose is the purchase of defaulted consumer debts to be collected upon, is a debt collector governed by the FDCPA and is liable for its own acts as a party to the collection lawsuit and for acts it has others take to collect its debts.

Defendant argues that NCOP "is not a debt collector: it is a debt-buyer, and the FDCPA is not applicable." DE 77, Def. MSJ Opp. pp. 8-14. Plaintiff incorporates by reference her prior rebuttal to this argument her motion for summary judgment DE 67, Pl. MSJ, pp. 8-9, and in opposition to NCO's motion for summary judgment, DE 80, Pl. MSJ Opp., pp. 10-12. Plaintiff has also previously noted that NCO has already admitted that NCOP and NCO Financial Services operate as a single entity in regarded to Ms. Polanco's account. DE 80, Pl. MSJ Opp., pp. 8-10. Plaintiff submitted substantial evidence to prove NCO is a debt collector as contemplated by the FDCPA. *See* [DE 68], Pl. 56.1 ¶s 4-15; *see also* [DE 79], Plaintiff's counterstatement of facts in response to NCO's motion for summary judgment ("Pl. Ctr. 56.1"), ¶s C.1-C.3. Defendants admits that it purchases charged of consumer accounts, Pl. 56.1 ¶ 4, and that it purchased Ms. Polanco's putative account and placed the account with NCO Financial Systems, Inc. for collection. Pl. Ctr. 56.1 ¶1

In its response, pp. 9-11, Defendant attempts in vain to distinguish *Okyere v. Palisades Collection, LLC*, 961 F. Supp. 2d 508 (S.D.N.Y. 2013) (*Okyere I*) in two ways.

First, Defendant argues,"Here, NCO Portfolio Management, Inc. is a debt-buyer" and that "it played no part in the collection process. NCO Portfolio Management, Inc. took no steps to actively collect the debt." This is exactly the same position taken by Palisades, the debt buyer in *Okyere*. The court rejected the argument:

> As Palisades notes, the complaint makes no allegations that it took any action with respect to the violations alleged in the complaint other than engaging the Houslanger Defendants to represent it in court. As a result, Palisades argues that it cannot be liable for the acts of the Houslanger Defendants. This argument is rejected.

Okyere I, p. 515 (citations to record omitted).

Second, Defendant contends that *Okyere I* "opined that vicarious liability *only* attaches in the context of an attorney-client relationship under the FDCP A when both the attorney and client constitute debt collectors." DE 77, Def. MSJ Opp. p. 10 (emphasis added). Not only is this false, but the opposite is true. While *Okyere I* indicated that vicarious liability was even stronger in the attorney-client relationship, it began its analysis by adopting *Pollice*, a Third Circuit opinion which was found vicarious liability non-attorney context: where a non-attorney debt collector was collecting on behalf of a debt buyer. Indeed, in the sentence following the one quoted above ("This argument is rejected"), the court stated:

> Case law has held that an entity that "itself meets the definition of 'debt collector' may be held vicariously liable for unlawful collection activities carried out by another on its behalf." *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 404 (3d Cir.2000). In *Pollice*, for example, a company called NFT, which was involved in purchasing delinquent claims from municipalities, entered into an agreement with another debt collection company, CARC, under which CARC would collect on claims for the benefit of NFT. 225 F.3d at 385–86. Similar to Okyere's complaint, the plaintiff's complaint in *Pollice* stated throughout that NFT committed certain violations of the FDCPA "through" CARC. *Id.* at 386–87, 393. The Third Circuit held that NFT "may be held vicariously liable for CARC's collection activity" because a debt collector subject to the FDCPA should "bear the burden of monitoring the activities of those it enlists to collect debts on its behalf." *Id.* at 405.

Okyere I pp. 515-516.

Note that *Okyere I* would find vicarious liability for Plaintiff even under *Pollice*, in the non-attorney context: "Similar to Okyere's complaint, the plaintiff's complaint in *Pollice* stated throughout that NFT committed certain violations of the FDCPA "through" CARC." *Id.*

NCO also cites to an out-of-circuit district court case, *Scally v. Hilco Receivables, LLC*, 392 F. Supp. 2d 1036 (N.D. Ill. 2005). *Scally* has been squarely rejected in the SD NY:

> However, the Sherman Defendants argue that even though they are buyers of defaulted debts, they should not be considered debt collectors because they have not actively engaged in collecting the Debt or maintained a high level of control over the collection of the Debt. The Sherman Defendants' position relies primarily on the recent Northern District of Illinois decision, *Scally v. Hilco Receivables, LLC*, 392 F.Supp.2d 1036 (N.D.Ill.2005)… The Sherman Defendants' reliance on *Scally* in support of their present motion is misplaced….
>
> Moreover, courts have expressly held that purchasers of defaulted debt are covered by the FDCPA, without regard to their level of collection activity.

Kinel v. Sherman Acquisition II LP, No. 05 CIV. 3456(RC)THK, 2006 WL 5157678, at *7 (S.D.N.Y. Feb. 28, 2006) *report and recommendation adopted*, No. 05 CIV. 3456(KMW), 2007 WL 2049566 (S.D.N.Y. July 13, 2007*), citing to e.g. Pollice, supra*, and *Munoz v. Pipestone*, 397 F.Supp.2d 1129, 1133 (D.Minn.2005) (finding that an entity in the business of collecting debts, but that does not communicate itself with a debtor, can be liable for a violation of the FDCPA);

Judge Torres recently rejected some of the key reasoning in *Scally*, while not referencing the opinion by name:

> Rather, Velocity maintains that it is not a "direct" debt collector because it did not participate in any debt collection activity against Plaintiff, and that it is not an "indirect" debt collector because Plaintiff has failed to allege the interdependence or control necessary to establish an agency relationship. In addition, Velocity argues that the fact that it has acted as a debt collector in other instances does not make it a debt collector in this case. Plaintiff has sufficiently alleged that Velocity is a debt collector for purposes of this action. …
>
> Contrary to Velocity's position (and ignoring for the moment that Plaintiff does allege the existence of an agency relationship), Plaintiff is not required to prove an agency relationship to establish that Velocity is a debt collector. In making this argument, Velocity appears to conflate the question of whether an entity is a debt collector under the FDCPA with the question of whether one debt collector can be found vicariously liable for the conduct of another acting on its behalf. The court in *Suquilanda* recognized that determining whether an entity is a debt collector requires a separate analysis before vicarious liability may be addressed.

Plummer v. Atl. Credit & Fin., Inc., No. 13 CIV. 7562 AT, --- F.Supp.3d ----, 2014 WL 6969546, at *3-4 (S.D.N.Y. Dec. 8, 2014) *citing to Suquilanda v. Cohen & Slamowitz, LLP*, No. 10 CIV. 5868 PKC, 2011 WL 4344044, at *10 (S.D.N.Y. Sept. 8, 2011) ("Here, plaintiff alleges that the Encore Defendants acquired the debt "after [the] obligation ... was in default" and that all of the Encore Defendants are primarily engaged

> in the collection of debt. The facts alleged support the conclusion that these entities are "debt collectors…)

Scally has even been explicitly rejected by another court in the same judicial. *Schutz v. Arrow Fin. Servs., LLC*, 465 F. Supp. 2d 872, 876 (N.D. Ill. 2006)("Like the *Pollice* court, this Court sees no reason to limit the use of vicarious liability to companies that have engaged an attorney to collect debts. Vicarious liability emerged as a means to provide equal relief to not only those victimized by attorney debt collectors, but also consumers victimized by non-attorney debt collectors…We believe it would be incongruous to hold debt collectors who use attorney agents liable to a greater extent than debt collectors who use non-attorney agents to collect their debts.")

In the case at bar, Defendant has no response to Plaintiff's argument that by being the named party in the collection lawsuit, it was directly liable under the FDCPA. In other words, by having a lawsuit filed in its name, NCOP, as the plaintiff in the collection lawsuit, was directly collecting against consumers it sued. This was the holding of Judge Chin in holding a debt buyer plaintiff in a collection lawsuit to be a debt collector under the FDCPA.

> I conclude, as a matter of law, that the Leucadia defendants are "debt collectors." The Second Circuit has interpreted the FDCPA's definition of "debt collector" to include an entity that attempts to collect debts in default and does not "service" the debt, even though it nominally owns the debt and is collecting it for itself. *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 83–85 (2d Cir.2003) (citing 15 U.S.C. § 1692a(6)(F)(iii)). First, the Complaint alleges that the Leucadia defendants are principally in the business of buying defaulted debts and seeking to collect on them, as they have filed more than 100,000 debt collection actions in state courts since 2006. Second, the Complaint alleges numerous instances in which the Leucadia defendants used interstate wires, to prepare non-military affidavits and to freeze plaintiffs' bank accounts, among other acts. Thus, they fall squarely within the first prong of section 1692a(6)'s definition of "debt collector."
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> *Sykes v. Mel Harris & Associates, LLC,* 757 F. Supp. 2d 413, 423 (S.D.N.Y. 2010).

Importantly, the holding turns not just on the Leucadia defendants being principally in the business of buying defaulted debts, but also "seeking to collect on them, as they have filed more than 100,000 debt collection actions in state courts since 2006." The filing of the collection lawsuits in their name the Leucadia defendants were "seeking to collect on" they debts they purchased. Further, by finding the Leucadia defendants debt collectors, Judge Chin held that the named plaintiffs stated a claim for relief against the Leucadia defendants (as well as the debt collection law firm Leucadia used to file the collection lawsuits) for filing false affidavits of merit and false affidavits of service. *Sykes* at. 419, 424.

Therefore, like the Leucadia defendants, NCOP was directly "seeking to collect on" debts it owned by filing collection lawsuits in its name, and is liable for FDCPA violations that arise from the debt collection litigation for which it is a party, including false affidavits of service.

3. Defendant is liable for conversion.

Defendant argues that "Plaintiff's conversion claim fails as a matter of law." DE 77, Def. MSJ Opp. pp. 8-14. Plaintiff incorporates by reference her prior rebuttal to this argument made in DE 67, Pl. MSJ, pp. 9-15.

In its response, Defendant focuses on the date its in-house legal department received a copy of the order to return Ms. Polanco's money forthwith. Defendants also focuses whether it was waiting for an explanation from Sharin & Lipshie as to the meaning of an order that NCOP was to return Ms. Polanco's money "forthwith" or be subject to contempt, as if that language was not clear on its face. In any event, none of this matters for conversion liability. In *Okyere II*, the debt collection law firm (Houslanger) contended it *never* received the state court order to cease collection activities, so therefore could not be liable for conversion for failing to comply with an order it did not know off. Magistrate Gorenstein rejected this argument. "Additionally, because the Houslanger defendants' liability is predicated on Moses's taking of the funds in violation of the court order, their own receipt of the order is not relevant." *Okyere II* at 535.

In its response, Defendants attempt to distinguish *Okyere II*, DE 77, Def. MSJ Opp. p. 15, asserting:

> The facts here are undeniably different. NCO Portfolio Management, Inc. is a debt-buyer and never had any interactions with plaintiff; its third party debt collectors did; the record is devoid of any evidence of contact between NCO Portfolio Management, Inc. and plaintiff. To the extent any entities possessed plaintiff's monies, those entities were the debt collectors, MSH and NCO Financial Systems, Inc.

However, this is *exactly* the fact pattern in *Okyere II*. There, the debt buyer, Palisades noted "the complaint makes no allegations that it took any action with respect to the violations alleged in the complaint other than engaging the Houslanger Defendants to represent it in court." *Okyere II* at 515. Similarly, the garnished funds were held exclusively in the possession of the city marshal; it was never disbursed to the debt buyer (Palisades) or its debt collection law firm (Houslanger). *Okyere II* at 535-36. Even if Harris or NCO Financial Services never disbursed to NCOP the funds garnished from Ms. Polanco (a doubtful proposition), they would still have been holding the money for the benefit of NCOP, the plaintiff in the collection lawsuit. In that instance, NCOP would be liable for conversion just as Palisades was in *Okyere II* even though the funds were held at all times by the city marshal.

4. No reasonable juror could find a nearly 5 ½ month delay in returning Ms. Polanco's money to be "forthwith."

In passing, Defendant makes a new argument that "there is a disputed fact question whether a delay of 4 months [before returning Ms. Polanco's money] was reasonable." DE 77, Def. MSJ Opp. p. 4. On March 17, 2011, the Court also ordered, "any funds previously or currently, including fees, in the possession of the Plaintiff [NCOP], city Marshall or any other agent shall be returned to Defendant [Ms. Polanco] ***forthwith***. Plaintiff's [NCOP's], City Marshall's or any other of Plaintiff's agency' failure to comply with this Order shall subject said party to a finding of contempt of this Court." DE 68, Pl. 56.1 ¶ 41 *citing to* DE 69-2, p. 1 (March 17, 2011 order) (emphasis added). Even NCO's corporate representative admits "forthwith" means "right away," or within a few days. DE 68, Pl. 56.1 ¶ 46. However, Defendant did not return Ms. Polanco's money until August 26, 2011, nearly 5 ½ months later. Importantly NCOP – as a party to the debt collection action – was ordered to return Ms. Polanco's money forthwith. As a party to the collection lawsuit, NCOP is bound by the orders in the collection lawsuit. In sum, no reasonable jury could conclude that the nearly 5 ½ month delay in Defendant's return of Ms. Polanco's money could be considered "forthwith."

5. The state court has already accepted Ms. Polanco's undisputed claims of sewer service by finding she demonstrated "good cause" to vacate the default judgment.

NCO obtained a default judgment against Plaintiff in the underlying collections lawsuit by submitting a false affidavit of service. Pl. 56.1 ¶16-21. The state court considered the issue and adjudicated that Plaintiff was never served and that the affidavit of service was false. Pl. 56.1 ¶16-21, 27, 34-35 40-41. In particular, Judge Cruz specifically found Ms. Polanco had "shown excusable default and a meritorious defense" to the collection lawsuit. Pl. 56.1 ¶35. In other words, the state court vacated the default judgment because Plaintiff demonstrated by a preponderance of the evidence that she was never served—along with the logically inherent fact that the affidavit of service was false.

Even assuming *arguendo* there was no prior adjudication on the merits, there is still no question of fact based on the evidence provided. Plaintiff provided substantial evidence to show she was never served and that the affidavit of service is false. NCO submitted no further evidence to suggest that Plaintiff was served or that the affidavit of service is correct, just that it exists. Therefore, summary judgment as to liability under the FDCPA is appropriate at this stage for Plaintiff's sewer service claim.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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